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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 THE WAVE STUDIO, LLC,

4 Plaintiff,

5 v.

13 Civ. 9239 (CS)

6 CONFERENCE

7 GENERAL HOTEL MANAGEMENT, LTD., et al.,

8 Defendants.

9
10 United States Courthouse
11 White Plains, N.Y.
November 2, 2015

12
13 Before: THE HONORABLE PAUL E. DAVISON, Magistrate Judge

14
15 APPEARANCES

16 COBALT, LLP
Attorneys for Plaintiff
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19 BAXTER, SMITH & SHAPIRO, P.C.
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23 HOWARD J. SCHWARTZ

24
25 *Proceeding recorded via digital recording device.

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1 THE DEPUTY CLERK: In the matter of Wave Studio
2 against General Hotel Management, et al.

3 Would the plaintiff please stand and note your
4 appearance for the record.

5 MR. TOKE: Absolutely.

6 Vijay Toke of Cobalt, LLP for the plaintiff the Wave
7 Studio, LLC, your Honor.

8 THE COURT: Good afternoon, Mr. Toke.

9 MR. TOKE: Good afternoon.

10 THE DEPUTY CLERK: Defense counsel.

11 MR. SCHWARTZ: Howard J. Schwartz for General Hotel
12 Management.

13 THE COURT: Mr. Schwartz.

14 MR. SHAPIRO: Good morning, your Honor. Sim Shapiro
15 from the law firm of Baxter, Smith & Shapiro on behalf of the
16 defendant Delta, which is one of the stayed defendants.

17 THE COURT: Welcome, Mr. Shapiro.

18 And I note that there are numerous other defendants
19 who have been stayed at this stage of the litigation and are
20 not appearing, and there's certainly no reason why they should
21 be.

22 All right. We're assembled to address some discovery
23 related issues raised by plaintiff's counsel.

24 Mr. Toke, it's your application, so you have the
25 floor.

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1 MR. TOKE: Thank you, your Honor.

2 As noted in our papers, your Honor, plaintiff asks for
3 several types of relief here from the Court regarding the
4 production of documents as well as the deposition of GHM.

5 With regard to documents, there were initial document
6 requests that were served by Wave's prior counsel in the late
7 summer or fall of 2014. GHM responded to that discovery with a
8 porosity of documents of about 1200 pages.

9 THE COURT: That sounds like a lot of documents to me.

10 MR. TOKE: 1200 pages total, your Honor, for 120-some
11 different requests about work that occurred over a ten-year
12 period with 20 different hotels. It's actually a shockingly
13 small number of documents for the volume and size of this case
14 as well as the level and extent of the infringement.
15 Nonetheless, we can point to numerous documents that have been
16 dribbled out here and there that are clearly relevant that were
17 never produced.

18 As the Court may recall or may not know, in the fall
19 of 2014, there was a problem with previous counsel for Wave.
20 There was a conflict with one of the stayed defendants.
21 Actually, they were sued in California, MasterCard. And then
22 there was some discussion about prior counsel being
23 disqualified altogether. That process took a number of months,
24 at which point our firm took over. And as soon as we took
25 over, we took the mantle on meet-and-confer efforts with regard

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1 to discovery. So we've been discussing these documents with
2 opposing counsel since April and May of this year.

3 These documents should have been produced in the
4 beginning. They're clearly relevant. They have to do with the
5 hotels at issue here and the marketing that happened. They're
6 clearly within the ambit of the language of the document
7 requests and weren't produced. Nonetheless, we met and
8 conferred and talked about it and, finally, they were produced
9 just a few days before we were all to fly to Singapore. They
10 were produced in --

11 THE COURT: Okay, just so -- you're referring to these
12 documents. Just so the record is clear, you're now talking
13 about management service contracts and licensing agreements
14 with respect to different hotels.

15 MR. TOKE: I'm speaking about management services
16 contracts, your Honor. Those management services contracts did
17 refer to license agreements, which, to date, have not been
18 produced. We put them into a new set of requests for
19 production because, while they should have been produced over a
20 year ago, they -- we put a name to them so there was no way for
21 GHM to evade that request.

22 So, in any event, the management services agreements
23 were produced just a few days before we were all to fly to
24 Singapore. They were done -- they were produced in redacted
25 form as well as designated attorneys' eyes only. And the only

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1 basis that GHM gave for redactions was not privilege, but
2 relevance.

3 Relevance is not an appropriate basis for them to be
4 redacting portions of these documents, to say these are
5 relevant and these were not to this case. They're responsive
6 to the discovery and it's for plaintiff to determine whether or
7 not the documents are useful. To redact solely on relevance is
8 inappropriate.

9 Moreover, even in the deposition of GHM, it was clear
10 that certain provisions that were, in fact, redacted were
11 directly relevant to the issues in the case. Now, whether they
12 are probative, whether they have any important information that
13 bears on the ultimate issues is not the inquiry here; it is
14 whether or not plaintiff should be able to see those documents,
15 review them and ask questions about them. And that was --

16 THE COURT: Plaintiff's counsel.

17 MR. TOKE: Pardon me?

18 THE COURT: Plaintiff's counsel.

19 MR. TOKE: Plaintiff's counsel, correct, your Honor.

20 And in fact, that did not happen because we didn't get
21 them until just days before. They were in highly redacted
22 form. When we met and conferred before the deposition, GHM's
23 counsel said they're just not relevant, we don't see how
24 they're relevant, and we responded exactly with the argument we
25 just provided to the Court and were told take it up with the

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1 Judge, so that's what we've done. The license agreements,
2 which are also referenced in some of the management services
3 agreements, were not. These deal specifically with
4 intellectual property. We have no idea --

5 THE COURT: Let me just cut you off --

6 MR. TOKE: Sure.

7 THE COURT: -- because I read defendants' responsive
8 letter to indicate that the license agreements are going to be
9 produced.

10 MR. TOKE: They are, that's correct.

11 THE COURT: Right.

12 MR. TOKE: Now. Except that we've already flown to
13 Singapore. We've already taken the deposition of GHM. We
14 reserved our rights to ask for more time, as we have in our
15 papers, because we were there to take this deposition, and
16 these documents which were clearly responsive to discovery
17 served over a year ago were never produced. And now they're
18 telling us we're going to produce it. They're going to produce
19 the unredacted version of the management services agreements.
20 But we are back here in the United States, not in Singapore.
21 This was dilatory on GHM's behalf by over a year.

22 THE COURT: Did predecessor counsel object
23 contemporaneously to what they were given or not given a year
24 ago?

25 MR. TOKE: Not that I'm aware of, your Honor, but as

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1 soon as we took over the case in April, we did and we began
2 those discussions. Now we're talking, okay, even if they're
3 not a year dilatory, they are six months dilatory. It's still
4 a matter of time for documents that are clearly within their
5 records, clearly important because they are the basis for their
6 business. These couldn't have been difficult to find or
7 produce and, yet, it took six months for them to do that and,
8 on top of it, producing them in redacted form so that we
9 couldn't use them. I mean, as the Court may have noted in the
10 papers that we submitted, you can see how redacted they are.
11 There are headings and most of the documents are not even
12 readable as a result of the redactions.

13 So that's the document portion of it, your Honor.
14 There's also the ESI portion. We've produced documents,
15 e-mails, from GHM that GHM did not produce that were clearly
16 responsive to the --

17 THE COURT: When were those communications?

18 MR. TOKE: They were in -- I don't recall. They were
19 all over the span of the time that --

20 THE COURT: But years and years ago?

21 MR. TOKE: Yes, that's correct, your Honor.

22 THE COURT: What's your basis for believing -- in
23 other words, it is entirely possible that your client retained
24 items that defendants did not retain, so my question is what's
25 your basis for believing that they've been improperly withheld

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1 which would require some basis for believing that they had been
2 retained or were on hand somehow at defendants' premises?

3 MR. TOKE: Sure. Well, because defendant did produce
4 a number of random e-mails throughout that same period of time.
5 Why those e-mails were -- because it wasn't just for one year,
6 it was several years of e-mails that have been produced, so why
7 those e-mails were retained, but other e-mails weren't, we
8 don't know. And so we're simply asking for a certification so
9 that we know what was actually done to conduct the search
10 because, without knowing what was done to conduct the search,
11 there's no way for us to fairly evaluate whether or not they've
12 done a diligent search and whether or not there are other
13 documents that they have that they simply haven't looked for
14 and could. That's what we're asking for.

15 Obviously, what they have is a black box. We don't
16 know. But what we do know is we have produced a number of
17 documents that were responsive. They haven't produced those
18 same documents that were generated by them. And we are simply
19 looking for an assurance or understanding or and understanding
20 of what was done to conduct the search so that we can fairly
21 evaluate whether or not there needs to be a greater search or
22 whether or not it is what it is, that's what they have. And
23 that's fine. But the fact that really critical e-mails that we
24 have that they generated were not produced is important.

25 In addition, with regard to the electronically stored

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1 information, we have met and conferred with regard to terms and
2 asked for them to conduct a search. We don't know what the
3 result of that is other than they produced some documents on
4 September 9th which included a couple more e-mails and that's
5 about it. But the fact that they then supplemented with more
6 e-mails again suggests that they didn't -- we don't know what
7 the search was and that it may not have been completely
8 thorough.

9 That's the documentary portion, I think, your Honor.
10 We can certainly talk about --

11 THE COURT: Did you make any effort to explore this
12 scope of search issue when you were over there in Singapore?

13 MR. TOKE: Not when we were in Singapore, your Honor,
14 no, no, because they had already produced the documents. We
15 were trying to take the deposition. We had limited time.

16 THE COURT: So that was not one of the (30) (b) (6)
17 topics that you inquired about?

18 MR. TOKE: What was not?

19 THE COURT: The methodology or, you know, question
20 that would or topic that would embrace the adequacy of the
21 search for documents.

22 MR. TOKE: No, it was not, your Honor, it was not,
23 your Honor.

24 THE COURT: All right. I interrupted you.

25 MR. TOKE: No, that was just the documentary portion

1 of our requests here. We can talk about the deposition, as
2 well, if that makes sense or if the Court would like to break
3 it up.

4 THE COURT: Why don't you go ahead and --

5 MR. TOKE: Address that as well?

6 THE COURT: -- address that issue.

7 MR. TOKE: Sure.

8 Well, with regard to the deposition and wanting more
9 time to do that, first, with regard to the documents that
10 haven't been produced, obviously plaintiff should have the
11 opportunity to depose GHM with regard to those documents in an
12 unredacted form as well as the documents that were not produced
13 before, like the licensing agreements, which, as we noted in
14 one of our exhibits, there was an e-mail, your Honor. I think
15 it is -- I believe it is -- I apologize, your Honor. I'm
16 trying to -- it is one of the e-mails that discusses the
17 ownership -- yes, it's Exhibit J to our --

18 THE COURT: Okay, let me catch up with you.

19 MR. TOKE: Sure.

20 THE COURT: Exhibit J. All right --

21 MR. TOKE: If you'll flip to --

22 THE COURT: An e-mail from a Mr. OEI?

23 MR. TOKE: Yes, Kendall Oei, who is the director of
24 GHM. This is written in June of 2006, June 28th of 2006.

25 If you'll flip to the second page, your Honor, at the

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1 bottom. This is in the thread. It's an e-mail from June 30th,
2 2006 from Mr. Oei to a Mr. Richard Hong, who is I believe a
3 representative of a property that used to be represented by
4 GHM, stating, "In most of our hotel brochures, the photos used
5 are not the property of the owner" -- that's the hotel, or the
6 property -- "but are the property of GHM/Waves," Waves being
7 our client. "Thus, they're covered by the GHM license
8 agreement and technically cannot be used whether in existing
9 brochures or in new brochures."

10 This is important because it suggests that the
11 licensing agreements have some bearing on this issue.

12 THE COURT: Right.

13 Now, when did you receive this e-mail chain that we're
14 talking about, Exhibit J?

15 MR. TOKE: This was produced by Wave back a year ago,
16 your Honor.

17 THE COURT: This was produced by Wave?

18 MR. TOKE: This was actually produced by Wave.

19 THE COURT: This is a Wave document?

20 MR. TOKE: Well, it's a Wave document because --

21 THE COURT: A document that Wave had in its
22 possession.

23 MR. TOKE: Correct. But it was generated by GHM.

24 So this e-mail was not produced by GHM and, again,
25 it's indicative of, one, this is sort of a central e-mail. It

1 talks about the ownership of copyrights to the photographs. It
2 mentions licensing agreements that were not produced and that
3 were referenced in the management services agreements produced
4 just days before the Singapore deposition. All of these
5 together indicate that we may not have gotten all the
6 documents, and we have not had the opportunity to fairly depose
7 GHM as a result.

8 THE COURT: Well, when prior to the trip to Singapore
9 did plaintiffs request the licensing agreement that was
10 referenced in that e-mail that we just talked about?

11 MR. TOKE: We were under the impression that we were
12 going to get all of the agreements that were relevant and
13 related to the management services agreements when we asked for
14 them in April or May. We hadn't seen the agreements, so we
15 didn't know exactly to call them by name, but they're related
16 to the management services agreements. They're incorporated by
17 reference. So as far as we're concerned, April or May and,
18 yet, they were not produced. They still have not been
19 produced. And so when we took the deposition of GHM, we had no
20 benefit of that. We looked at this --

21 THE COURT: When you got on the airplane to Singapore,
22 you knew you didn't have licensing agreements.

23 MR. TOKE: Well, your Honor, I was -- they were -- we
24 received the documents on Wednesday, the 16th. I had already
25 advised Mr. Schwartz that I was going to be out of town already

1 and leaving for Singapore. In order to get the documents
2 copied and actually sent to Singapore in time for the
3 deposition, they had to leave by Thursday. So I was actually
4 reviewing the documents as I was en route. There was no way to
5 actually know because of the time changes. And so the first
6 time I was actually able to even have the meet and confer with
7 Mr. Schwartz was the morning of the deposition. I suppose it's
8 possible I could have done it Monday in Singapore, but I was
9 still reviewing documents with the client and so it took some
10 time to prepare it and be able to do it before the deposition.

11 So that's the first part with regard to the
12 deposition, because we weren't able to depose them meaningfully
13 based on documents that have not been produced.

14 Second, as we discussed in our papers, Ms. Chng was
15 not knowledgeable about half of the topics on the list.

16 THE COURT: What do you mean -- and this is -- I'm
17 practically paraphrasing the colloquy that appears on the
18 transcript excerpt that I was provided with, but what do you
19 mean by knowledgeable?

20 MR. TOKE: Well, she didn't have any knowledge about
21 these issues, personal knowledge certainly, but -- and so she
22 said that she would not be able to testify on any of those
23 topics and that Mr. Ohletz, the third-party witness, would have
24 been the person to talk to. And when asked about topics that
25 she said he was knowledgeable about, she didn't respond. She

1 would say Mr. Ohletz is the person you need to talk to, not
2 that --

3 THE COURT: Are you talking about the transcript
4 excerpt that you gave me or some other portion of the
5 deposition that I don't have?

6 MR. TOKE: You have them, your Honor. You have them,
7 your Honor. Where we went through the (30) (b) (6) topics, she
8 said which ones she had knowledge about and which she didn't of
9 which half of them she did not, and that Mr. Ohletz --

10 THE COURT: Well, but I read that as her indication
11 that she did not have personal knowledge of some of these
12 topics because she didn't work at the company at the time that
13 some of these events happened.

14 MR. TOKE: Sure. She also, however, hadn't read any
15 documents to prepare for the deposition and wouldn't answer
16 questions about those topics when I asked about them. For
17 example --

18 THE COURT: In some other portion of the deposition --

19 MR. TOKE: Yes, which are there.

20 THE COURT: -- which you haven't provided me.

21 MR. TOKE: No, which have been provided, your Honor, I
22 believe. In fact --but I believe -- yes, they have been
23 produced, your Honor. If the Court will indulge me for a
24 moment.

25 (Pause)

1 MR. TOKE: Page 11, lines 7 to 9 I asked her about a
2 topic that she had said that Mr. Ohletz would testify on, and
3 she admitted --

4 THE COURT: I'm sorry.

5 MR. TOKE: Oh, pardon me.

6 THE COURT: We must be looking at different
7 transcripts.

8 MR. TOKE: We are looking at -- pardon me, your Honor.
9 I apologize. This would actually be -- let me find it.

10 (Pause)

11 MR. TOKE: There was a portion -- I apologize, your
12 Honor. It actually -- I apologize, your Honor. It may
13 actually be in a different exhibit. I believe we have produced
14 it to the Court, but let me double -- I will double check in a
15 moment, when Mr. Schwartz is speaking.

16 But in any event, yes, the testimony was basically
17 that I asked her a question about a topic that she had said
18 that she had knowledge of, but deferred to Mr. Ohletz,
19 nonetheless, as well as a topic that she said she did not have
20 knowledge on and said Mr. Ohletz was the person you should be
21 talking to. Again, it was not just that she didn't have
22 personal knowledge, but she couldn't speak to the issues at
23 all.

24 So I will double check, your Honor, with regard to
25 the --

1 THE COURT: I will tell you we went over this pretty
2 carefully and I didn't find that, so I would appreciate it if
3 you have something specific --

4 MR. TOKE: Of course, your Honor.

5 THE COURT: -- to tell me what it is.

6 MR. TOKE: Sure.

7 THE COURT: Because we carefully go over what counsel
8 submits to us --

9 MR. TOKE: Of course.

10 THE COURT: -- and we can't be mind readers.

11 MR. TOKE: Absolutely, your Honor.

12 Nonetheless, that's the second basis for getting some
13 more time with GHM, the first basis being we haven't had a
14 meaningful ability to ask them about documents that were not
15 produced.

16 THE COURT: You know, I think defendants are going to
17 stand up and say that they gave you what they gave you, and I
18 guess that's the management service contracts in their redacted
19 form, immediately or almost immediately upon the entry of a
20 confidentiality order which had been the subject of some
21 discussion in connection with this.

22 MR. TOKE: Sure. And that's true, your Honor.
23 However, these documents should have been able to have been
24 produced far before that. We didn't know about the -- we
25 discovered that GHM wouldn't produce it unless there was a

1 discovery order sometime in August. We discussed the discovery
2 order. Moreover, we didn't know it was going to come in
3 redacted form. It would be one thing if they said, all right,
4 we produced them on the 9th of -- pardon me -- the 16th of
5 September, just a few days before the deposition, but here they
6 are. They're designated attorneys' eyes only, but here they
7 are in full form. That's not what happened. We got them in
8 completely redacted form so that, even despite that, they were
9 useless documents because we couldn't read provisions that even
10 Ms. Chng testified were relevant and important for the
11 proceeding and this matter. So that's why that's important.

12 The license agreements were never produced, and they
13 still haven't been produced, and they're clearly central
14 because they're referenced in the management services
15 agreement, they're referenced in Mr. Oei's e-mail and they're
16 key documents that go to the very heart of this case's issue --
17 the threshold issue of who owns these photographs; rather, the
18 copyrights to the photographs. So without being able to take
19 testimony on that very central and singular issue that's before
20 the Court today, we didn't have the ability to meaningfully
21 depose GHM. And these are documents, once again, that were
22 asked for a year ago and hadn't been produced. We've asked for
23 them since April, but we didn't find out until August that they
24 needed a -- they wouldn't be produced unless there was a
25 confidentiality order in place. We agreed on August 31st as to

1 the form of that discovery order. It wasn't submitted to the
2 Court for ten days after that.

3 There's certainly been delay here and the timing of it
4 certainly made it very difficult for plaintiff to have a
5 meaningful deposition on key central documents that they've
6 been asking for for six months. So that's our position.

7 THE COURT: Does that exhaust your list of grievances
8 today?

9 MR. TOKE: Yes.

10 THE COURT: All right.

11 Mr. Schwartz.

12 MR. SCHWARTZ: Good morning, your Honor. Or good
13 afternoon, your Honor.

14 So we're told that GHM trademark license agreements
15 are very central and completely important to this case, so I'll
16 just tell you just briefly what they are. The agreements, 15
17 or 20 years ago, were between GHM and the hotels and they
18 related only -- only -- to the hotel's use of General Hotel
19 Management's trademarks. But if he wants them, I'm happy to
20 give them to him.

21 THE COURT: So you're going to produce them. It's off
22 my desk if you're going to produce them.

23 When can you produce those?

24 MR. SCHWARTZ: I had intended to produce them when
25 they were due, but --

1 THE COURT: Let's expedite that.

2 MR. SCHWARTZ: I can produce them within a week.

3 THE COURT: Okay.

4 MR. SCHWARTZ: A week from today.

5 THE COURT: Okay.

6 MR. SCHWARTZ: With the financial terms deleted, you
7 know, how much money they have to pay us for that. I think
8 that is proprietary information. It's not relevant to the case
9 in any fashion.

10 THE COURT: All right.

11 MR. SCHWARTZ: And then on the next issue of the
12 management agreements, so the portions that we redacted, I said
13 in the transcript, at page 45, not just that they were, in some
14 cases, not relevant, but that they were proprietary, and that's
15 why I left in the captions. So that the portions that are
16 deleted -- the -- yes, the --

17 THE COURT: I mean, we looked over this. Obviously,
18 we can't tell, either, what's in the redacted portions, but I
19 will tell you that the one that jumped out to me was the
20 miscellaneous section, which it's a little bit hard for me to
21 know how the plaintiff could satisfy himself that that's not
22 relevant with such a generic heading on it.

23 MR. SCHWARTZ: I did not realize that that was one
24 that he considered important. I'll check on it.

25 THE COURT: I don't know if he considers it important

1 or not, but I just looked at it and said that's not very
2 helpful.

3 MR. SCHWARTZ: Give me two seconds.

4 THE COURT: Sure.

5 MR. SCHWARTZ: After I finish this, I'll look at it
6 and maybe I'll say, okay, if he wants --

7 THE COURT: Okay, well, go ahead, because I am
8 somewhat mystified by the approach that GHM has taken to this,
9 the sort of double-barreled, number one, designating them
10 attorneys' eyes only, which I assume is designed to make sure
11 that the plaintiff herself, who counsel have indicated you
12 don't trust for various reasons, doesn't get her hands on this
13 information, but that being the case, to then severely redact
14 these documents, I was puzzled by that because usually these
15 types of extreme confidentiality designations are used to make
16 it possible to divulge things that might otherwise put the
17 producer at some kind of competitive or other disadvantage.

18 MR. SCHWARTZ: So the discussion about that is
19 sensitive, and while we have no distrust of Mr. Toke, I have no
20 reason to distrust Mr. Toke, there is more than the usual
21 antipathy between the plaintiff and the defendant.

22 As we put in the footnote, in this --

23 THE COURT: No, I understand you've got reasons to
24 question plaintiff's motives, but that's really -- I take that
25 as a given.

1 MR. SCHWARTZ: Yes. And it's more than just the
2 usual, but this is a person who, in our view, has a very
3 specific and clear motive to hurt our client, and given that
4 high level of distrust and given that we can see no possible
5 relationship between the portions that we redacted, although
6 I'll look at the miscellaneous and possibly give it to him, and
7 I said I would give him three agreements at the paragraph that
8 are labeled advertising. They're not really advertising, but I
9 viewed them again. I have them here today. I can give them to
10 Mr. Toke. They related in large portion to reservation systems
11 that GHM would use and advance the company's -- the hotel's
12 reservation systems. So they're not really related in any
13 fashion at all to any issue in the underlying case. And I'll
14 give them to Mr. Toke. I have them here with me today. I can
15 read them into the record if we designate the record
16 confidential. I have no particular problem.

17 THE COURT: Let's not do that.

18 MR. SCHWARTZ: Okay, okay. And I appreciate that.
19 But I'm trying to say that the information that we redacted
20 really in no conceivable --

21 THE COURT: You're telling me it's irrelevant, but I
22 take a somewhat less nuanced view of this, and contracts and
23 things like that are ordinarily the types of documents which
24 have to be read in their totality in order for them to be
25 analyzed and evaluated. And you've got this attorneys' eyes

1 only designation which plaintiff is not really challenging at
2 this point, so why shouldn't I simply order you to produce
3 these unredacted and authorize you to -- you know, if there are
4 specific financial numbers or some specific term or value in
5 there that has some sort of competitive significance, I would
6 not be surprised to see financial terms redacted. And again, I
7 think that's what you've indicated you're going to do with
8 respect to the licensing agreements. But when I see these big
9 block redactions, I mean, it looks to me like the kind of thing
10 that I would expect to see coming out of the CIA or something.
11 Is there some other reason why you're seeking all this
12 redaction?

13 MR. SCHWARTZ: No. But then the question then becomes
14 what are we going to do with that. So let's say that -- let's
15 say that I'm correct that a neutral -- a judge reviewing the
16 unredacted version would say, well, you know, these are all --
17 there's no conceivable way that there should be any discussion
18 about those issues.

19 THE COURT: Ninety-five percent -- my perception is
20 that ninety-five percent of the information that gets exchanged
21 in civil litigation is irrelevant to the issues at hand, so
22 there's nothing --

23 MR. SCHWARTZ: It's ninety-nine percent in my view.

24 THE COURT: Well, it may be even higher, but -- a
25 hundred percent in some cases -- but that's not really an

1 answer. And ordinarily, you know, we have open-file discovery
2 and it's up to the adversary to seek to separate the chaff from
3 the grain and make what use he can make with material that the
4 producing party thinks is irrelevant.

5 So I'm giving you an opportunity to tell me some other
6 reason why I shouldn't simply order you to turn that over,
7 especially since it's going to be AEO.

8 MR. SCHWARTZ: All right. Then I agree to turn over
9 the management agreements attorneys' eyes only. And I will
10 redact financial terms, things that I believe are clearly
11 related to financial terms or anything else, because I don't
12 remember off the top of my head any other significantly
13 proprietary information, because --

14 THE COURT: All right. And if you're going to do
15 that, rather than sort of engendering another dispute, you
16 ought to provide some accompanying explanation to counsel as to
17 what is being redacted, what type of information is being
18 redacted, because, otherwise, the redaction itself becomes sort
19 of catnip for further inquiry.

20 MR. SCHWARTZ: Well, that was my problem.

21 All right. As I understand it, then, I'll turn over
22 the unredacted versions of the management agreements except for
23 portions that are relating clearly to financial terms or
24 anything else that the client feels is proprietary. And if I
25 do that, I will identify the reason why and what information is

1 contained, sort of like a privileged log, the same way we --

2 THE COURT: Well, that's right. And then, you know,
3 if plaintiff wants to challenge that, then, you know, I suppose
4 I'll end up reviewing it in camera or something.

5 MR. SCHWARTZ: Well, that's actually in the terms of
6 the confidentiality order.

7 THE COURT: Right.

8 MR. SCHWARTZ: It says that.

9 THE COURT: Well, but the confidentiality order
10 doesn't say redact, right? The confidentiality order provides
11 a procedure for challenging confidentiality designations. But
12 it seems to me that when you have that type of a robust
13 confidentiality --

14 MR. SCHWARTZ: Production.

15 THE COURT: -- protection in place, then that's a
16 reason not to redact, not to, you know -- the
17 belt-and-suspenders aspect of your position -- and again, I
18 understand your client doesn't like the plaintiff, and I'm sure
19 it's mutual, but that's kind of the rough and tumble of
20 litigation.

21 MR. SCHWARTZ: And without meaning to make your
22 life -- your Honor's life more difficult, I --

23 THE COURT: You probably could not possibly make my
24 life any more difficult.

25 MR. SCHWARTZ: I would say I would hand you an

1 unredacted -- I would send you an unredacted version, and then
2 you could determine which sections --

3 THE COURT: I don't want to do that. I want you to do
4 what you just said you were going to do --

5 MR. SCHWARTZ: Okay.

6 THE COURT: -- which is unredact, eliminate any
7 redactions based on "relevance," and if there are financial
8 terms or other "proprietary" information, you will accompany
9 any remaining redactions with something in the nature of a
10 privileged advising plaintiff of the nature of the information
11 that has been redacted.

12 MR. TOKE: If I might, your Honor, with regard to that
13 procedure, one of the problems with the proprietary designation
14 is, again, there's no real basis when we have an attorneys'
15 eyes only designation. Now, plaintiff certainly reserves the
16 right to challenge that designation at a later date if that is
17 necessary, but, at this point, we're not. But, for example,
18 the very provision that was highly relevant to the matter,
19 which we've submitted that testimony from Ms. Chng that says,
20 yes, this provision is exactly what was the basis for all of
21 this marketing collateral that was generated, she called
22 proprietary and it was redacted. And so I'm concerned that
23 GHM --

24 THE COURT: Mr. Schwartz, I am going to assume that
25 you know what Mr. Toke is talking about, and if your client's

1 representative designated a portion of these agreements as
2 material to the issues in this litigation, I think, at the end
3 of the day, the Court would be hard-pressed to sanction
4 withholding that information from plaintiff's counsel, so let's
5 be so advised.

6 MR. SCHWARTZ: All right.

7 So if I could just continue, so the description of
8 Ms. Chng's deposition is not exactly what she said. Even the
9 last statement, that she said it was the most important
10 thing --

11 THE COURT: You know, I don't want to go any farther
12 out on this limb today.

13 MR. SCHWARTZ: Right, right.

14 THE COURT: You're going to reproduce these agreements
15 in what I assume will be dramatically less redacted form.
16 You're going to tell plaintiff what it is you're redacting.
17 And then if there's any remaining issue, counsel will let me
18 know what it is.

19 MR. SCHWARTZ: Correct. Redacted and still
20 maintaining the attorneys' eyes only issue. That's my only
21 reservation.

22 THE COURT: Yes.

23 MR. SCHWARTZ: So, yes, we will do that. And then --
24 so we have the license -- the trademark license -- the GHM
25 trademark license agreements I'll produce within a week.

1 Management agreements unredacted mostly, with the exception we
2 just described, also by next Monday.

3 And then the other issue was this what I refer to as
4 this fake discovery certification. Do you need me to discuss
5 this?

6 THE COURT: Well, why don't you speak to --

7 MR. SCHWARTZ: I'll respond to it.

8 THE COURT: -- this issue that the plaintiff
9 apparently has copies of e-mails that were generated by your
10 client that your client doesn't have.

11 MR. SCHWARTZ: No, no. She was copied on it. That's
12 why she has it.

13 THE COURT: I understand that, I understand that.

14 MR. SCHWARTZ: We have no -- we don't have that
15 anymore. She saved it. Good for her. God bless her. We have
16 no particular problem with that. We don't have any of those.
17 We don't have any of those e-mails, period. Whatever.
18 Whatever, meaning not in a disparaging way, but we don't have
19 any of these -- we don't have any of those e-mails whatever,
20 whatever year. These go back to the year 2000. I think the
21 e-mail from Mr. Oei was 2006, if my memory serves me correctly.
22 And so we don't have them. We just don't have them. We
23 didn't -- we didn't have them when this litigation was started.
24 Obviously, the litigation hold letter was sent.

25 To show the kind of cooperation that we did try to

1 undergo when Mr. Toke came in, he was complaining. He said
2 ESI, ESI, it's all ESI, and we said, well, you know, they don't
3 have the same -- GHM doesn't have the same setup that Apple
4 does, for example, and so tell me what you want. Give me some
5 more terms. He gave me some more terms. We used those terms.
6 We said -- the terms were obvious, you know. Her name. I
7 think Mr. Yang's name. You know, whatever names he wanted we
8 ran again. No such e-mails exist. I told him that. There was
9 one on his list I think we didn't even know what it was. I
10 think the name was Ekwis. We didn't even know what that was.
11 So -- and so he served a second set of interrogatories or
12 document demands. We responded and said, yes, we did what we
13 were supposed to do. The client did what it was supposed to
14 do. We don't have anymore.

15 And he says only 1200 documents. It doesn't make a
16 difference. You know, if he produced 350,000 pages, what they
17 are is screen shots of photographs that are on the internet,
18 350,000 pages, in many cases, of the same photograph. Well,
19 God bless him. That's what he did.

20 The underlying transactions -- when I mean
21 transactions, the underlying interplay between GHM and his
22 client -- was between Mr. Ohletz and Junior Li. And that's
23 what Mr. Ohletz testified about. He's the only one that spoke
24 to her on a consistent basis. He went to the photo shoots he
25 estimated 90 percent of the time. There was no e-mails back

1 and forth. There was no document that he knew of, other than
2 the management agreements, that he knew of that existed, that
3 pertained to this. So this is not a
4 document-intensive-circumstance case. I mean, there are no
5 documents that pertain to this.

6 THE COURT: Well, in any event, what I need you to do
7 is assure this Court that your client has undertaken a diligent
8 search of its books and records and produced what remains in
9 the company's files concerning the issues identified by
10 plaintiff's counsel.

11 MR. SCHWARTZ: I can say that here in court today. So
12 when my firm came in -- first of all, the first law firm that
13 was involved in this case is a law firm known to us and my
14 firm. Highly reputable. We have no issues with them at all.
15 They sent a litigation hold on all the documents. They
16 followed up on the first go-round of the documents. Then we
17 came into the case. We followed up again on the second thing.
18 And then when Mr. Toke served the follow-up set of -- second
19 set of interrogatories and document demands and all that, we
20 specifically went over very clearly with the client, the
21 lawyers in my firm and I personally talking with Ms. Chng, who
22 is the only person we ever dealt with there. She said she
23 ran -- she did the whole thing again and said whatever she had,
24 she had. And when we went to Singapore -- when I went to
25 Singapore, I asked her again. And I find Ms. Chng to be

1 completely reliable, a very sophisticated person. There is no
2 document that anybody knows was -- is or was being withheld or
3 is or was spoliated in any fashion. We just don't have the
4 e-mails that plaintiff had. And God bless if she has them.
5 Good for her.

6 Mind you, the e-mails aren't particularly relevant to
7 the case other than the e-mails that she has with her
8 production estimates, you know, the UCC-type documents, the
9 production estimates and the invoices. And she has them and we
10 don't. Well, that's okay, because it wasn't -- we didn't pay
11 the invoices. The hotels paid the invoices. And we didn't
12 particularly have -- we don't particularly have a lot of books
13 and records having to do with her. That's it. We don't have
14 any. And there's no written agreement alleged between her and
15 GHM. There's no reason for us to have any information about
16 her copyright filings, which were some of the questions that --
17 on his list of information that she's supposed to know about.
18 Miss Li's activities in New York. Well, Monica Chng didn't
19 know anything about those things and she just didn't.

20 So the information that he's looking for relative and
21 relevant to this case can be obtained only essentially through
22 two people, Ms. Chng and Mr. Ohletz. Mr. Ohletz no longer
23 works for us. He lives in Bangkok. Through my efforts, not
24 through plaintiff's efforts --

25 THE COURT: No, I know. He was deposed. And I

1 crawled out of bed to --

2 MR. SCHWARTZ: Exactly.

3 THE COURT: -- even up the --

4 MR. SCHWARTZ: And to be very -- I don't want to
5 polish the apple here, but to be very deferential to your Honor
6 and to make sure there was no further problem with this, I
7 initially said, well, I would take three hours and he got one
8 hour because it's my witness and I flipped it. So I could have
9 one hour about and Mr. Toke took three hours. I didn't block
10 him. There was no objection.

11 THE COURT: Look, this is water under the dam. I
12 ruled on this. The deposition is over already.

13 MR. SCHWARTZ: No, but I think here today he is not
14 complaining that there was any information that he wanted that
15 he couldn't get, except for the license -- the GHM trademark
16 license agreement, which is going to say we licensed the
17 trademark to the hotel.

18 THE COURT: All right. You're going to produce that,
19 and then I'll wait for the next wave of issues.

20 MR. SCHWARTZ: No pun intended. Wave the issue.

21 So what I'm trying to say is the rest of this is just
22 litigation rhetoric. And appreciate that no plaintiff ever
23 thinks he has enough documents or, frankly, defendants ever
24 think they have enough documents, but this case is where it is.
25 This is what the evidence is going to be in this case.

1 THE COURT: I want to finish. You can have a seat for
2 a second.

3 MR. TOKE: All right.

4 THE COURT: You make me nervous when you're standing
5 up and not talking, so --

6 MR. TOKE: Oh, I apologize. I'll sit.

7 THE COURT: Yes.

8 All right. That leads us to the issues relating to
9 plaintiff's allegation that the (30) (b) (6) witness was
10 inadequately prepared or inadequately testified.

11 MR. SCHWARTZ: She was. Obviously, she was prepared.
12 And Mr. Toke says that Ms. Chng testified that she didn't
13 review any documents before the deposition, that's a completely
14 true statement. He's confusing that, preparing for the
15 deposition, with having knowledge about the case and about the
16 underlying documents. She testified for the whole day. And
17 you'll note that there's no real specific allegation that I can
18 tell that she didn't testify about anything that a (30) (b) (6)
19 witness should testify. What started out was, if you read the
20 transcript, you'll see Mr. Toke said --

21 THE COURT: Well, I've read about a dozen pages which
22 I've been given.

23 MR. SCHWARTZ: Right.

24 THE COURT: Both sides are referring to this
25 deposition, which I did not attend and can only read that which

1 is put before me. But go ahead.

2 MR. SCHWARTZ: And what I'm suggesting to your Honor
3 is that those first 15 or 25 pages are the basis for this
4 motion because, perhaps inadvertently or perhaps just maybe a
5 litigation tactic, he asked in a very conclusory way do you
6 know anything about or do you have any personal knowledge about
7 item number 15 on this list and she would say I have knowledge
8 or she would say no, it's better to ask Mr. Ohletz, which she
9 quit clearly knew was going to be there the next day. And then
10 Mr. Toke deposed her all day long. And so she answered all the
11 questions about things that she knew about, and if she
12 believed -- because, mind you, she wasn't there at the time
13 that --

14 THE COURT: Right. Well, the whole problem is that
15 plaintiff is entitled to demand that defendants produce a
16 witness who is reasonably prepared to give binding testimony on
17 behalf of the corporate defendant with respect to the
18 designated issues. So whether plaintiff got answers to his
19 questions from Mr. Ohletz is not really the point here. The
20 point is whether the (30) (b) (6) designee was able to testify on
21 behalf of the company with respect to these subjects.

22 MR. SCHWARTZ: Well, yes, she certainly was able to
23 testify on behalf of the subjects. But it doesn't have to be
24 only one (30) (b) (6) witness. You can have more than one
25 (30) (b) (6) witness if there are different people in a company

1 who have different knowledge. That has never been a problem as
2 far as I'm concerned, as far as I can see in general
3 litigation. So Ms. Chng was clearly prepared. She knew about
4 all of the agreements. She did not know about the actual
5 interplay between Ohletz and Junior Li and she said, well, it's
6 better to ask Ohletz. And the next day, he asked Ohletz
7 whatever --

8 THE COURT: Well, let me follow up on something that I
9 believe you said. And I have notes about this. I think this
10 was actually when we had that telephone conference on September
11 22nd with counsel in Singapore in the midst of all of this. I
12 think at that time you indicated that you thought that your
13 client would be willing to adopt Ohletz' answers as binding on
14 GHM.

15 MR. SCHWARTZ: If that's the question before the
16 Court, I can -- I assume the answer to that question would be
17 yes. I didn't specifically review that with the client before
18 today. I can give you an answer. Probably take two or three
19 days with the time difference. How about this? By next
20 Friday, when I produce all the other documents, I will give you
21 an answer. I suspect that the answer will be yes, that
22 Mr. Ohletz' answers can be --

23 THE COURT: Because that's the -- you know, the
24 purpose of Rule (30) (b) (6), or at least one of the purposes of
25 it was to eliminate the practice that apparently was previously

1 prevalent of what was called bandying, which is the company
2 produces a witness and then says, oh, I don't know, you have to
3 ask somebody else and it turns into a wild goose chase. Now,
4 this is not that because I think everyone agrees that
5 Mr. Ohletz is the person -- actually, the flesh and blood
6 living and breathing person that had interactions with Ms. Li,
7 so I'm not accusing -- I'm not suggesting there's some improper
8 motivation there. Obviously, he's going to be knowledgeable
9 about events in which he personally participated. But if the
10 company is willing to adopt his testimony as binding on the
11 company, that would, it seems to me, extinguish this issue.

12 MR. SCHWARTZ: I'll give you answer to that certainly
13 no later than next Monday, I think I said, so a week from
14 today. I have no particular issue with that, no issue with
15 that at all.

16 THE COURT: All right.

17 Mr. Toke, is there anything else you wanted to tell
18 me?

19 MR. TOKE: No, your Honor, only that, with regard to
20 the requests, that we would be able to depose GHM for the
21 purposes of any additional documents that are produced.

22 THE COURT: You're getting some additional documents.
23 I will entertain an application after you've received those
24 documents and you can identify for me anything in there that
25 you think warrants a further deposition, but, subject to some

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1 significant revelation in those documents, I'm denying that
2 application at this time.

3 Defendants will produce the license agreements, which
4 we've discussed. They will produce the management agreements
5 in substantially unredacted form, as discussed. I am satisfied
6 that defendants have satisfied their discovery obligations.

7 Obviously, Mr. Schwartz, defendants, have a continuing
8 duty to disclose. And if Mr. Toke alerts to defendants to some
9 other material that might be relevant or should be searched,
10 you need to do that.

11 But to the extent that plaintiff is seeking some other
12 agreement or certification, that application is denied.

13 All right. Discovery is presently scheduled to
14 conclude on November 20th. Is that correct?

15 MR. TOKE: Correct, your Honor.

16 THE COURT: Does anybody anticipate that's going to be
17 a problem?

18 MR. TOKE: Well, your Honor, if we --

19 THE COURT: Depends on what you get and what's in
20 there.

21 MR. TOKE: Depends on what we get and what's in there.

22 THE COURT: All right. Well, why don't we phone
23 conference this case like around November 20th, Frank.

24 THE DEPUTY CLERK: Sure.

25 THE COURT: Mr. Shapiro, I assume you're here as an

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1 interested observer and not as an active participant.

2 MR. SHAPIRO: I have nothing to add, your Honor.

3 THE COURT: Okay. Didn't want to ignore somebody
4 who's sitting here.

5 THE DEPUTY CLERK: We can do the 20th at 10 a.m.

6 THE COURT: The 20th at 10 a.m.

7 MR. TOKE: Your Honor, that is 7 a.m. Pacific time.

8 THE COURT: Oh. We'll do it later.

9 MR. TOKE: I get to the office usually by 7:30, but
10 that's --

11 THE COURT: Well, what time would be convenient for
12 you, Mr. Toke?

13 MR. TOKE: If we could say 11:30 Eastern, would that
14 be possible?

15 THE COURT: Frank.

16 MR. TOKE: We can do 11:30.

17 THE COURT: Okay. Done.

18 Thank you all. We stand in recess.

19 MR. SCHWARTZ: Thank you.

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